United States Court of Appeals,
Eighth Circuit.

In re: SDDS, INC., a South Dakota,
Corporation, Petitioner.

SDDS, Inc., Appellee/Cross-appellant,

v.

State of South Dakota, Appellant/Cross-appellee.

Mark W. Barnett, Attorney General of the State of South Dakota; Joyce Hazeltine, Secretary of State of South Dakota; George S. Mickelson, Governor of the State of South Dakota, Defendants.

Action for the Environment,
Intervenor Defendant.

Nos. 98-3588, 99-1034, 99-1035.

Submitted: May 8, 2000.
Filed: Sept. 15, 2000.

Before McMILLIAN, JOHN R. GIBSON and BEAM, Circuit Judges.

McMILLIAN, Circuit Judge.

This matter began in 1991 with a complaint filed in the United States District Court for the District of South Dakota by SDDS, Inc. (SDDS), against the State of South Dakota (the State), seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. Since then, the case has come before this court on three separate occasions, see *SDDS, Inc.* v. *State of South Dakota*, 994 F.2d 486 (8th Cir. 1993) (*SDDS III*); *id.*, 47 F.3d 263 (8th Cir. 1995) (*SDDS VI*); *id.*, 97 F.3d 1030 (8th Cir. 1996) (*SDDS VIII*), and related litigation has been ongoing in

the South Dakota state courts. Now, on this fourth visit to the Eighth Circuit, the parties present us with the following: (1) an appeal by the State from the district court order denying the State's motion pursuant to Fed. R. Civ. P. 60(b) to set aside prior federal court judgments; (2) an appeal by the State and cross-appeal by SDDS from an order of the district court awarding SDDS attorneys' fees and costs; and (3) a petition to recall, clarify, and supplement the mandate issued pursuant to our decision in *SDDS VIII*. For reasons stated below, we affirm the orders of the district court,[1] and we deny SDDS's petition to recall the mandate.

The background facts have been stated in our prior opinions. See *SDDS VIII*, 97 F.3d at 1032-34. Briefly summarized, this litigation arises out of an unsuccessful effort by SDDS to construct and operate a multistate solid waste disposal (MSWD) facility near Edgemont, South Dakota. Opposition to the MSWD facility prompted, among other things, two ballot initiatives. The second ballot initiative, or referendum, effectively ended SDDS's plan to develop the MSWD facility. See *id.* at 1033 ("The electorate vetoed the MSWD facility, which 'shut down' SDDS's MSWD site."). SDDS brought the present § 1983 action against the State and numerous state officials (collectively the defendants) in federal district court alleging that the second ballot initiative violated the dormant commerce clause. SDDS also filed an action against the defendants in South Dakota state court to recover just compensation for an alleged de facto "taking," or inverse condemnation, of its property by way of the referendum.

For nearly ten years, the two cases — one in federal court, the other in state court — followed long, convoluted, and intertwined procedural journeys. Along the way, we twice reversed summary judgment dispositions by the district court in favor of the defendants. See *SDDS III*, 994 F.2d at 494;

---

[1] The Honorable Richard H. Battey, Chief Judge, United States District Court for the District of South Dakota.

SDDS VI, 47 F.3d at 272. Consistent with our decision in *SDDS VI*, the district court, on April 24, 1995, entered judgment in favor of SDDS and against the defendants, declaring that the second ballot initiative violated the dormant commerce clause and assessing costs to the defendants. In F.3d at 1041-42, *SDDS VIII*, 97 we instructed the district court to enter an order enjoining the defendants from relitigating certain specified issues in the state court proceedings. After the mandate for *SDDS VIII* issued on November 15, 1996, the district court issued the required injunction on December 12, 1996. The South Dakota Supreme Court held that the state courts were bound by the district court's order granting the defendants injunctive relief, notwithstanding its disagreement with that order on the merits, and, on May 18, 1998, the United States Supreme Court denied the defendants' resulting petition for a writ of certiorari. See *SDDS, Inc.* v. *State*, 569 N.W.2d 289, 293-95 & n.9 (S.D. 1997) (*SDDS IX*), *cert. denied*, 523 U.S. 1118, 118 S. Ct. 1796, 140 L.Ed.2d 937 (1998) (*SDDS X*).

On June 9, 1998, the State moved pursuant to Fed. R. Civ. P. 60(b)(4) to set aside the district court's judgments of April 24, 1995, and December 12, 1996, on the ground that those prior final decisions were void because they were entered in violation of the Eleventh Amendment. On August 24, 1998, the district court denied the State's Fed. R. Civ. P. 60(b) motion.See *SDDS* v. *State of South Dakota*, No. CIV. 91-5121 (D.S.D. Aug. 24, 1998). SDDS then moved in the district court for attorneys' fees and costs incurred in opposing the State's Fed. R. Civ. P. 60(b) motion, and the State opposed SDDS's request. On November 6, 1998, the district court awarded SDDS attorneys' fees and costs, but not the full amount of attorneys' fees requested. See *SDDS* v. *State of South Dakota*, No. CIV. 91-5121 (Nov. 6, 1998).

Appeal No. 98-3588

The State appeals from the district court's order of August 24, 1998, denying the State's Fed. R. Civ. P. 60(b)

motion.Upon careful review, we hold that the district court did not err in denying the State relief pursuant to Fed. R. Civ. P. 60(b)(4) because the State did not seek review, by petition for writ of certiorari, of either *SDDS VI* or *SDDS VIII* and instead has attempted to collaterally attack those final decisions by way of a Rule 60(b) motion in the district court. Just as a Rule 60(b) motion cannot be used to relitigate the merits of a district court's prior judgment in lieu of a timely appeal, nor can it be used to collaterally attack a final court of appeals' ruling in lieu of a proper petition for review in the United States Supreme Court. *Cf. Kocher* v. *Dow Chemical Co.*, 132 F.3d 1225, 1229 (8th Cir. 1997) ("A party may not use a Rule 60(b)(4) motion as a substitute for a timely appeal. In other words, if a party fails to appeal an adverse judgment and then files a Rule 60(b)(4) motion after the time permitted for an ordinary appeal has expired, the motion will not succeed merely because the same argument would have succeeded on appeal."). Moreover, while the Eleventh Amendment provides the State with a defense, it does not automatically deprive the federal courts of original jurisdiction.See *Wisconsin Dep't of Corrections* v. *Schacht*, 524 U.S. 381, 389, 118 S. Ct. 2047, 141 L.Ed.2d 364 (1998) ("The Eleventh Amendment ... does not automatically destroy original jurisdiction.Rather, the Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense."). As in the present case, "[a] state may ... waive its Eleventh Amendment immunity through its conduct. Courts have inferred a waiver when the State has made a general appearance in federal court and defended a lawsuit on the merits." *Hankins* v. *Finnel*, 964 F.2d 853, 856 (8th Cir.) (citations omitted), cert. denied, 506 U.S. 1013, 113 S. Ct. 635, 121 L.Ed.2d 566 (1992). In the present case, the State for many years actively and vigorously litigated the merits of SDDS's claims in federal court, never once raising an Eleventh Amendment immunity defense until after the mandates had been issued and our decisions in *SDDS VI* and *SDDS VIII* were final. In light of the State's conduct, it would appear that the

State has waived any sovereign immunity defense it may have had to the claims addressed in *SDDS VI* and *SDDS VIII*. The district court's order of August 24, 1998, is affirmed.

Cross-appeals Nos. 99-1034/1035

The State also appeals the district court's November 6, 1998, award of attorneys' fees and costs, again relying on the argument that the underlying judgments were void on Eleventh Amendment grounds. SDDS cross-appeals, arguing that the district court abused its discretion in failing to award the full amount of attorneys' fees requested.

Upon review, we note that the State's appeal from the award of attorneys' fees and costs assumes success on its appeal from the district court's August 24, 1998, decision, involving the merits of the State's belated Eleventh Amendment defense. Having affirmed the August 24, 1998, order, we find no basis for reversing the district court's decision to award SDDS attorneys' fees and costs. (It would, of course, defy logic to permit the State to invoke its Eleventh Amendment argument to now preclude SDDS from recovering attorneys' fees and costs which were incurred in defeating that very argument.)

Furthermore, on careful review of the district court's determination of SDDS's reasonable attorneys' fees, we hold that the district court did not abuse its discretion in declining to award SDDS's entire request. The district court's order of November 6, 1998, is affirmed.

Petition to recall the mandate

In the spring of 1999, the inverse condemnation case in South Dakota state court proceeded to trial before a jury on the issue of SDDS's damages. On April 6, 1999, the jury found that SDDS's damages amounted to $10.1 million.The State moved for judgment notwithstanding the verdict (JNOV) or a new trial, and, on January 6, 2000, the state trial court held a hearing on the motion.Ruling from the bench, the state trial

court denied the State's motion for JNOV but granted a new trial on the basis of instructional error. Thereafter, on February 23, 2000, SDDS challenged that ruling by filing a petition in this court requesting that we recall, clarify, and supplement our mandate in *SDDS VIII*. In essence, SDDS argues that the state trial court has misconstrued the federal injunction, and we should therefore reopen and revise our earlier decision in order to compel a different ruling by the state court. SDDS describes the relief it seeks as follows: "This would necessarily consist [of] an additional direction to the district court to enjoin the Defendants and the state trial court from relitigating any of those issues expressly and by necessary implication decided by this Court in *SDDS VI* or *SDDS VIII*." SDDS's Petition to Recall, Clarify and Supplement Mandate at 12 (emphasis added). In *SDDS VIII*, we directed the district court to enjoin the defendants, not the state courts, from relitigating certain issues. The district court complied with our directions, and the South Dakota Supreme Court ruled that the district court's order is binding upon the state courts. We do not, however, sit as a court of appeals over the South Dakota courts. We have neither the power nor the inclination to provide the extraordinary relief SDDS requests. The petition to recall the mandate is denied.

SDDS, INC., a South Dakota corporation, Plaintiff

vs.

STATE OF SOUTH DAKOTA, MARK BARNETT, as Attorney General for the State of South Dakota; WILLIAM JANKLOW, as Governor of the State of South Dakota, and JOYCEHAZELTINE, as Secretary of State of the State of South Dakota, Defendants, and ACTION FOR THE ENVIRONMENT, Intervener/Defendant.

CIV. 91-5121

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, WESTERN DIVISION

August 24, 1998, Decided
August 24, 1998, Filed

DISPOSITION: Defendants' motion to set aside judgments (Docket # 154) denied.

ORDER

On April 24, 1995, this Court entered judgment in favor of plaintiff and against defendants declaring that South Dakota's referral of S.B. 169 violated the dormant commerce clause of the Constitution of the United States and 42 U.S.C. § 1983, and assessing costs to defendants.

This judgment was entered in accordance with the opinion and judgment of the United States Court of Appeals for the Eighth Circuit, dated February 6, 1995, and the mandate of that Court issued March 16, 1995.

On December 12, 1996, this Court entered judgment for plaintiff and against defendants restraining and enjoining them and their officers, agents, servants, employees, and attorneys, and all those persons in active concert or participation with them who receive actual notice of this order, from relitigating

in the South Dakota state courts the issue of (1) whether SDDS had a legitimate claim of entitlement to a permit to operate a multi- state solid waste disposal site, and (2) whether the referendum was the proximate cause of SDDS's dissolution.

This judgment was entered in accordance with the opinion and judgment of the United States Court of Appeals for the Eighth Circuit dated October 3, 1996, the mandate of the Court of Appeals issued November 15, 1996, and that Court's order relating to attorney's fees and costs dated November 29, 1996. On June 9, 1998 defendants filed a motion to set aside the above judgments.

Defendants' motion has been duly considered by this Court in light of the judgments and mandates of the Eighth Circuit Court of Appeals.

Accordingly, it is hereby

ORDERED that defendants' motion to set aside judgments (Docket # 154) is denied.

Dated this 24th day of August, 1998.

BY THE COURT:

RICHARD H. BATTEY

CHIEF JUDGE

United States Court of Appeals,
Eighth Circuit.

In re SDDS, INC., a South Dakota
Corporation, Petitioner.

No. 96-2705.

Submitted Aug. 26, 1996.
Decided Oct. 3, 1996.

Before MAGILL, JOHN R. GIBSON, and BEAM, Circuit Judges.

MAGILL, Circuit Judge.

South Dakota Disposal Systems, Inc. (SDDS) moved the district court to enjoin the State of South Dakota and various state officials in their official capacities, including Mark W. Barnett, Attorney General of the State of South Dakota, Walter D. Miller, Governor of the State of South Dakota, and Joyce Hazeltine, Secretary of the State of South Dakota (Defendants) from relitigating in the South Dakota state courts certain issues previously decided by this Court. The district court denied this motion, and SDDS now petitions this Court for a writ of mandamus, directing the district court to issue the injunction.Defendants object, arguing that this relief is improper under both the Eleventh Amendment and the Anti-Injunction Act, 28 U.S.C. § 2283. We disagree, and conclude that injunctive relief is proper in the circumstances of this case. Construing SDDS's petition as an appeal of the district court's denial of injunctive relief, we reverse.

I.

On the last occasion during which these parties were before us, we stated that it was "the latest in a seemingly never-ending series of cases arising from SDDS's six-year-long struggle to develop a large-scale [multistate solid waste disposal, or MSWD] facility near Edgemont, South Dakota." *SDDS, Inc.* v. *State of S.D.*, 47 F.3d 263, 265 (8th Cir. 1995) (*SDDS VI*).

This description was unfortunately prescient; one-and-a-half years after penning those words, litigation continues in both state and federal courts concerning SDDS's efforts to construct and operate the MSWD facility. In this latest incarnation of the case, we are called upon to determine if the Defendants are attempting to relitigate issues decided previously by this Court and, if so, whether the Defendants should be enjoined from attempting such relitigation.

The facts of this case have been stated and restated by a variety of courts; see *SDDS VI*, 47 F.3d at 265-67; *SDDS, Inc.* v. *State of S.D.*, 994 F.2d 486, 488-91 (8th Cir. 1993) (*SDDS III*); *SDDS, Inc.* v. *State of S.D.*, 843 F. Supp. 546, 548-52 (D.S.D.1994) (*SDDS V*), *rev'd*, *SDDS VI*, 47 F.3d at 265; *Matter of 1990 Renewal Application of SDDS*, 507 N.W.2d 702, 702-03 (S.D.1993) (*SDDS IV*); *SDDS, Inc.* v. *State*, 481 N.W.2d 270, 271- 72 (S.D.1992) (*SDDS II*); *Matter of SDDS, Inc.*, 472 N.W.2d 502, 504-06 (S.D.1991) (*SDDS I*); *SDDS, Inc.* v. *State of S.D.*, Civil Case No. 93- 324 (S.D. 6th Jud. Cir. Ct. Jan.17, 1996) (*SDDS VII*),[2] and only a brief summary need be provided here. SDDS purchased land in Fall River County, South Dakota, in 1988, with the intention of constructing the "Lonetree" facility, an MSWD site. In 1989, SDDS was successful in obtaining from the South Dakota Board of Minerals and Environment (Board) a one-year permit to site, construct, and operate the MSWD facility. In 1990, the Board granted SDDS a five-year renewal of its permit. Both permits were challenged in South Dakota state courts[3]. In *SDDS I*, the

---

[2] This is, of course, not a complete list of prior judicial recitations of the facts of this case.

[3] Under South Dakota law, an aggrieved party may appeal an adverse administrative decision to the state courts. See SDCL 1-26-30. "'A final determination of an agency decision is reached when the reviewing court, after deciding the correctness of the matter on review, affirms the decision or

South Dakota Supreme Court ruled that the one-year permit was invalid because the Board had made insufficient findings of fact. See *id.*, 472 N.W.2d at 513. In *SDDS IV*, the South Dakota Supreme Court held that, because the one-year permit had been declared invalid, the five-year renewal was void ab initio. See *id.*, 507 N.W.2d at 704. In 1991, on remand after *SDDS I*, the Board made the required specified findings that the proposed MSWD facility was environmentally safe and was in the public interest. See *SDDS VI*, 47 F.3d at 265 n.5 (detailing subsequent administrative history).[4]

During the course of the litigation over the Board's initial grant of permits to SDDS, the South Dakota electorate decided two ballot initiatives. The first, Initiative Measure No. 1, was approved in 1990, and required legislative approval of large-scale solid waste disposal sites. SDDS unsuccessfully challenged Initiative Measure No. 1 in the South Dakota trial court, see *SDDS, Inc.* v. *State of S.D.*, Civil Case No. 90-412 (S.D. 6th Cir. Ct. Oct. 31, 1991), and did not appeal to the South Dakota Supreme Court. The South Dakota legislature approved SDDS's MSWD site by passing 1991 Senate Bill 169. This bill was signed by the South Dakota governor, and was to

---

remands it to the agency for reconsideration and a decision in accord with that court's directive.'" *Matter of Exploration Permit Renewal, Etc.*, 323 N.W.2d 858, 860 (S.D.1982) (quoting *Matter of Silver King Mines, Permit EX-5*, 315 N.W.2d, 689, 693 (S.D.1982) (Morgan, J., dissenting)).

[4] It does not appear that any South Dakota state court has addressed the merits of the Board's 1991 findings that the MSWD facility was environmentally safe and in the public interest. Rather, upon judicial review, the case was remanded to the Board "for the opportunity to reissue Original Permit" because the original permits had been invalidated. See Br. in Support of Resp't's Answer at 4. SDDS never received reissued permits.

take effect on July 1, 1991. See *SDDS II*, 481 N.W.2d at 272 (determining effective date of 1991 Senate Bill 169).

The other ballot initiative decided by the South Dakota electorate was a referendum on Senate Bill 169, requiring voter approval of SDDS's MSWD site. See *SDDS VI*, 47 F.3d at 266. The electorate vetoed the MSWD facility, which "shut down" SDDS's completion of the Lonetree site. See *SDDS IV*, 507 N.W.2d at 703[5]. SDDS challenged the referendum measure in federal court, arguing that it offended the dormant commerce clause. We reversed the district court's grant of summary judgment to the defendants twice, first holding that the unsuccessful challenge to Initiative Measure No. 1 in the South Dakota trial court did not act to collaterally estop the challenge to the referendum, see *SDDS III*, 994 F.2d at 494, and later holding that the referendum violated the dormant commerce clause. See *SDDS VI*, 47 F.3d at 272 (reversing *SDDS V*).

During the course of this wide ranging litigation, SDDS never opened its proposed MSWD site. In 1994, it sold the land planned for the development of the MSWD and went out of business. SDDS brought suit against the Defendants in South Dakota state court to recover just compensation for an alleged uncompensated "taking" of its property by the Defendants through the unconstitutional referendum, in violation of the Fifth and Fourteenth Amendments. The South Dakota state trial court granted summary judgment to the Defendants, holding that SDDS had no property right in operating an MSWD site, and that the referendum was not a

---

[5] At the time the referendum was decided by the South Dakota voters, SDDS was still operating under its five-year renewal permit. It was several years after the referendum placed "Senate Bill 169 in limbo," *SDDS IV*, 507 N.W.2d at 703, long after SDDS incurred its alleged injuries, that the South Dakota Supreme Court declared SDDS's five-year renewal permit "void ab initio." *Id.* at 704.

proximate cause of SDDS's losses. See *SDDS VII*, Mem. Op. at 11, 18, 24-25. The appeal of *SDDS VII* is pending before the South Dakota Supreme Court.

Contending that the Defendants were attempting to relitigate issues decided by this Court in *SDDS VI*, SDDS sought an injunction in the federal district court against the Defendants. The district court summarily denied injunctive relief,[6] and SDDS now petitions this Court for a writ of mandamus. SDDS requests that we require the district court to issue an injunction against the Defendants, forbidding them from relitigating in the South Dakota state courts the issues of (1) whether SDDS had a legitimate claim of entitlement to a permit to operate an MSWD, and (2) whether the referendum was the proximate cause of SDDS's dissolution. The Defendants object to the issuance of the writ, arguing that the standards for a writ of mandamus have not been satisfied, that the Eleventh Amendment prohibits this suit, that the Anti- Injunction Act forbids issuance of the writ, and that injunctive relief is not

---

[6] The district court stated:

> On April 11, 1996, SDDS filed a motion for the issuance of an order to show cause, for a speedy hearing, and for a preliminary and a permanent injunction pursuant to the Declaratory Judgments Act and the All Writs Act. The state defendants responded on May 6, 1996. SDDS filed a reply on May 23, 1996. Essentially, SDDS's claim for injunctive relief seeks to have this Court enjoin a proceeding before the South Dakota Supreme Court. This Court declines to take such action.Accordingly, having considered the matter, it is hereby ORDERED that SDDS's motion for an order to show cause and for injunctive relief (Docket # 133) is denied.

SDDS, Inc. v. *State of S.D.*, Civil No. 91-5121 (D.S.D. May 28, 1996), reprinted in I Appellant's App. at Tab 12.

warranted by the facts of the case. We address each of these arguments in turn.

II.

The issuance of a writ of mandamus "is a drastic remedy to be invoked only in extraordinary situations," *Melahn* v. *Pennock Ins., Inc.*, 965 F.2d 1497, 1501 (8th Cir. 1992) (quotations omitted), and may issue "only if a petitioner is able to establish a clear and indisputable right to the relief sought, the defendant has a nondiscretionary duty to honor that right, and the petitioner has no other adequate alternative administrative or judicial remedy." *In re Lane*, 801 F.2d 1040, 1042 (8th Cir. 1986) (quotations and citations omitted). The Defendants argue that a writ of mandamus is inappropriate to require a district court to issue an injunction, because such relief is left to the discretion of the district court. See *id.* ("Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is clear and indisputable." (quotations and citations omitted)).

We need not reach the question of whether a writ of mandamus may issue to correct a district court's abuse of discretion in denying injunctive relief. A denial of an injunction is an immediately appealable interlocutory order, see 28 U.S.C. § 1292(a)(1). Where the liberal standards for notice of appeal have been met in a case, a petition for a writ of mandamus may be construed as a notice of appeal from an immediately appealable order by a district court. See *United States* v. *Gundersen*, 978 F.2d 580, 583-84 (10th Cir. 1992) (construing petition for mandamus as notice of appeal, and citing cases); *United States* v. *Green*, 499 F.2d 538, 540 n.5 (D.C. Cir. 1974) (per curiam) (citing cases). Here, SDDS's petition for mandamus "was the functional equivalent of a notice of appeal [because] it fulfilled [Fed. R. App. P.] 3's requirements concerning notice," Gundersen, 978 F.2d at 583 (analyzing *Smith* v. *Barry*, 502 U.S. 244, 112 S. Ct. 678, 116 L.Ed.2d 678 (1992)). SDDS's petition specified the party

taking the appeal, designated the district court order appealed from, and named the court to which the appeal was taken.See *id.*; see also Fed. R. App. P. 3(c). In all of the circumstances of this case, therefore, we believe it is appropriate to construe SDDS's petition for a writ of mandamus as a notice of appeal.

III.

The Eleventh Amendment generally bars suits brought against the states in federal courts. While the specific language of the Eleventh Amendment refers only to "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State," U.S. Const. amend. XI,

> we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition which it confirms. That presupposition, first observed over a century ago in *Hans* v. *Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L.Ed. 842 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States.

Seminole Tribe of Fla. v. *Florida*, 517 U.S. 44, ----, 116 S. Ct. 1114, 1122, 134 L.Ed.2d 252 (1996) (citations and quotations omitted).

The immunity recognized by the Eleventh Amendment extends to both suits for monetary damages and those for declaratory or injunctive relief; "The Eleventh Amendment does not exist solely in order to prevent federal court judgments that must be paid out of a State's treasury; it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Id.* at

----, 116 S. Ct. at 1124. South Dakota and its state officials sued in their official capacities would, therefore, normally be immune from suit in the federal courts.

In Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908), however, the Supreme Court established a fundamental exception to the Eleventh Amendment's immunity doctrine:

> Ex parte Young recognized that suits may be brought in federal court against state officials in their official capacities for prospective injunctive relief to prevent future violations of federal law. The doctrine of Ex parte Young is based on the idea that the power of federal courts to enjoin continuing violations of federal law is necessary to vindicate the federal interest in assuring the supremacy of that law.

Fond du Lac Band of Chippewa Indians v. *Carlson*, 68 F.3d 253, 255 (8th Cir. 1995) (quotations and citations omitted). See also *Denke* v. *South Dakota Dep't of Social Servs.*, 829 F.2d 688, 689 (8th Cir. 1987) ("Eleventh amendment analysis is an area dominated by formalistic rules, often neither intuitive nor strictly rational. However, over years of development, important exceptions to state immunity from suit have been recognized which allow citizens to vindicate rights infringed upon by state authorities. Extremely important in this regard is the substantial exception to the scope of the eleventh amendment represented by the case of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908)[,] and its progeny.").

Defendants did not contend that *SDDS VI* was improperly heard by this Court in violation of the Eleventh Amendment, and we do not believe that any such argument could have been successful. As a suit for prospective declaratory relief from South Dakota's ongoing violation of the dormant commerce clause, the Defendants could not have enjoyed immunity under the Eleventh Amendment in *SDDS VI*. See *Ex parte Young*,

209 U.S. at 159, 28 S. Ct. at 454 ("the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity").

The question presented is therefore whether the Defendants, who had been properly sued for declaratory relief in a prior suit, can now assert Eleventh Amendment immunity from this suit for prospective injunctive relief which seeks only to effectuate our earlier judgment. An affirmative answer would allow these Defendants, and all future state defendants, to effectively ignore judgments rendered in the federal courts, generating needless relitigation in the state courts, and rendering our judgments largely nugatory and advisory[7]. This

---

[7] Indeed, it is clear that this is precisely what the Defendants in this case have attempted to do to our judgment in *SDDS VI* almost from the moment the decision was filed. Upon our remand of the case to the district court for a determination of attorney's fees, the Defendants stated:

> All that has been obtained for the Plaintiff[in *SDDS VI*], however, is a declaratory judgment that the referendum was unconstitutional. The court of appeals let stand this court's important rulings on the due process and equal protection issues raised by Plaintiffs.
>
> Plaintiff has, in essence, obtained a judgment which can do it no good. [FN2 In its response to Defendants' submission on the "prevailing party" issue, Plaintiff claims in a footnote that the ruling of the court of appeals may have some application in the state "inverse condemnation" case, but Plaintiff does not explain how the court of appeals ruling on the commerce clause issue can have any application to the inverse condemnation case. Additionally, it is important to note that the state courts could agree with this court[']s ruling (which the court of appeals let stand)

> that Plaintiff had no property interest which could be unlawfully taken.] Plaintiff has in fact accomplished nothing more than obtaining "the moral satisfaction of knowing that a federal court concluded [its] rights had been violated...." *Farrar* vs. *Hobbey* [*Hobby*, 506 U.S. 103, 114, 113 S. Ct. 566, 574, 121 L.Ed.2d 494] (1992), quoting *Hewitt* v. *Helms*, 482 [U.S.] 755, 762 [107 S. Ct. 2672, 2676, 96 L.Ed.2d 654] (1987). In these circumstances, a substantial reduction in the amount awarded, or [no] award at all, see *Farrar*, 506 U.S. at 115 [113 S. Ct. at 575], is appropriate. Resp. to Mot. to Determine Award of Att'ys' Fees & Costs & Req. for Hr'g at 13-14, reprinted in I Appellant's App. at Tab 7 (ellipses in original). Contrary to the Defendants' mischaracterizations of *SDDS VI*, we did not "let stand" any portion of the district court decision in *SDDS V*; rather, we reversed the district court, and remanded the case to the district court "with instructions to enter judgment in favor of SDDS." *SDDS VI*, 47 F.3d at 272.

Similarly, in opposing SDDS's requested injunctive relief in the district court, the Defendants urged the district court to disregard our decision in *SDDS VI* by stating that:

> SDDS also argues that the Eighth Circuit decision is binding precedent on the state courts. While the United States Supreme Court has the authority to enter decisions binding on the South Dakota Supreme Court, the lower federal courts do not have such power.

State Defs.' Br. In Supp. of Resistance to Pl.'s Mot. for Order to Show Cause & for Speedy Hr'g & for Prelim. & Permanent Inj. at 14, reprinted in I Appellant's App. at Tab 10. Contrary to the Defendants' rather unique interpretation of federalism, the judgments of this Court are, in fact, entitled to the same res judicata and collateral estoppel effect in the South Dakota state courts as judgments rendered by those courts. See, e.g., *City of*

is an intolerable result, and one which is not, we believe, mandated by the Eleventh Amendment. We therefore hold that the Eleventh Amendment does not bar a suit in the federal court for injunctive relief to prohibit a state defendant from relitigating in a state court issues previously decided in a federal court.[8]

IV.

Embodying fundamental precepts of federalism and comity between federal and state courts, the Anti-Injunction Act provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly

---

Tacoma v. *Tacoma Taxpayers*, 357 U.S. 320, 334, 78 S. Ct. 1209, 1217-18, 2 L.Ed.2d 1345 (1958).

[8] The Defendants, citing *Green* v. *Mansour*, 474 U.S. 64, 106 S. Ct. 423, 88 L.Ed.2d 371 (1985), argue that the instant suit for injunctive relief is in fact a "demand that this Court direct the South Dakota courts to grant SDDS a monetary award to be paid from the South Dakota state treasury." Br. In Supp. of Resp't's Answer at 13. We disagree. Green was an action for declaratory relief for an alleged past violation of constitutional rights; "the award of a declaratory judgment in this situation would be useful in resolving the dispute over the past lawfulness of respondent's action only if it might be offered in state-court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed." *Green*, 474 U.S. at 73, 106 S. Ct. at 428. By contrast, the suit before us has been brought to effectuate our judgment in *SDDS VI*, a "[r]emed[y] designed to end a continuing violation of federal law [which was] necessary to vindicate the federal interest in assuring the supremacy of that law." *Id.* at 68, 106 S. Ct. at 426.

> authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283[9]. The Supreme Court has "expressly rejected the view that the anti-injunction statute merely states a flexible doctrine of comity, and [has] made clear that the statute imposes an absolute ban upon the issuance of a federal injunction against a pending state court proceeding, in the absence of one of the recognized exceptions...." *Mitchum* v. *Foster*, 407 U.S. 225, 228-29, 92 S. Ct. 2151, 2155, 32 L.Ed.2d 705 (1972) (citing *Atlantic Coast Line R.R.* v. *Locomotive Eng'rs*, 398 U.S. 281, 286-87, 90 S. Ct. 1739, 1743, 26 L.Ed.2d 234 (1970) (note omitted)).

---

[9] In *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 146, 108 S. Ct. 1684, 1689, 100 L.Ed.2d 127 (1988), the Supreme Court explained the purpose of the Anti-Injunction Act:

> The Act, which has existed in some form since 1793, see Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 335, is a necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts. It represents Congress' considered judgment as to how to balance the tensions inherent in such a system. Prevention of frequent federal court intervention is important to make the dual system work effectively. By generally barring such intervention, the Act forestalls the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court. Due in no small part to the fundamental constitutional independence of the States, Congress adopted a general policy under which state proceedings should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately [the United States Supreme Court]. (quotations and citations omitted).

Included in the Anti-Injunction Act are specific, enumerated exceptions. These exceptions, which "are designed to ensure the effectiveness and supremacy of federal law," *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 146, 108 S. Ct. 1684, 1689, 100 L.Ed.2d 127 (1988), include the relitigation exception. This exception

> was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of res judicata and collateral estoppel.

Id. at 147, 108 S. Ct. at 1690. See also *NBA* v. *Minnesota Pro. Basketball, Ltd. Partnership*, 56 F.3d 866, 871 (8th Cir. 1995) ("The legislative policy that permits a federal court to enjoin state court action when a federal court has decided a suit on its substantive merits has equal force when a critical underlying issue unrelated to the substantive merits of the action has been litigated to finality." (quotations and citations omitted)). As with all of the statutory exceptions, the relitigation exception is "narrow and [is] not to be enlarged by loose statutory construction." *Chick Kam Choo*, 486 U.S. at 146, 108 S. Ct. at 1689 (quotations and citations omitted).

We review de novo the applicability of the relitigation exception. See *NBA*, 56 F.3d at 871. In order to enjoin a state court from relitigating an issue, the issue must "actually have been decided by the federal court." *Chick Kam Choo*, 486 U.S. at 148, 108 S. Ct. at 1690. To determine if this strict and narrow prerequisite has been met, we must assess "the precise state of the record and what the earlier federal order actually said; [we may not] render a post hoc judgment as to what the order was intended to say." *Id.* (citing *Atlantic Coast*, 398 U.S. at 290, 90 S. Ct. at 1744-45 (emphasis in original)).

In an extended discussion, the district court in *SDDS V* held that SDDS had no protected property interest in operating

an MSWD facility, and that the referendum had no effect on SDDS's ability to operate an MSWD. The district court stated:

> Under South Dakota law, SDDS needs two things in order to operate its Lonetree facility: (1) a valid permit and (2) legislative approval from the South Dakota Legislature. See SDCL 34A-6-1.4 to 34A-6-1.13 (solid waste disposal facilities must obtain permits); and SDCL 34A-6-53 to 34A-6-56 (solid waste disposal facilities handling in excess of 200,000 tons of waste annually must get legislative approval for their operations).
>
> At the time of the Referendum in November 1992, SDDS's one-year permit had expired. In any event, that one-year permit was void because the [Board], in issuing the permit, failed to make specific findings of fact that the Lonetree facility was in the public interest and that the facility met five specified environmental prerequisites.
>
> Although the [Board] had issued SDDS a five-year renewal permit and the Legislature had passed S.B. 169 approving the operation of the Lonetree facility, the five-year permit was invalid because it was based upon an invalid one-year permit. The five-year renewal permit was void ab initio. In other words, SDDS has never had a valid permit to operate the Lonetree facility. Without a valid permit, SDDS has no constitutionally protected property interest in operating the facility. Both of SDDS's due process claims fail.
>
> The Court notes that SDDS's remaining commerce clause and equal protection claims rest solely on the effect of the Referendum, the validity of the Initiated Measure having already been decided by [the South Dakota state court]. Furthermore, because SDDS has never had a valid permit to operate its Lonetree facility, S.B. 169 and the subsequent Referendum "vetoing" that bill have no practical effect. By the very unambiguous terms of the Initiated Measure, legislative approval may only be

> granted to a facility that is operational "pursuant to solid waste permit." SDCL 34A-6-53. SDDS has never had a valid permit. The legislature cannot have granted approval of the Lonetree facility if the facility had no permit to operate. It logically follows that if the legislature was not in a position to grant approval to the Lonetree facility, then the enabling legislation (S.B.169) was of no effect. The Referendum would also be of no effect. If the Referendum had no effect, the commerce clause and the equal protection clause are not implicated.

SDDS V, 843 F. Supp. at 553-54 (citations and notations omitted).

The Defendants, in their brief to this Court in *SDDS VI*, argued strenuously that we affirm these holdings. See Appellee's Br. in No. 94-1688, at 10-17, 41, reprinted in part in I Appellant's App. at Tab 2[10]. SDDS, of course, strongly urged

---

[10] For example, the Defendants previously argued that South Dakota's laws regulating solid waste facilities have changed since SDDS obtained its original 1989 permit. South Dakota's solid waste regulations were entirely rewritten in July of 1990, and have been amended once before the November 1992 Referendum and once after. Appellee's Appendix G. Since the September 1991 findings issued by the Board were based on the original 1989 record, the September 1991 findings do not address or consider these regulatory changes. The Board must determine compliance with these new regulatory requirements before a solid waste permit can issue; this determination was never made and SDDS is therefore not entitled to a permit. Appellee's Br. in No. 94-1688, at 14-15, reprinted in I Appellant's App. at Tab 2. See also *id.* at 41 ("More importantly the Referendum's disapproval of Senate Bill 169 did not impact SDDS's ability to accept out of state waste because SDDS could not accept any waste, regardless of the source, until it obtained new state solid waste permits." (emphasis in original)).

that we reverse the district court on these points. See Appellant's Reply Br. in No. 94-1688, at 2-10, reprinted in I Appellant's App. at Tab 3.[11/]

In *SDDS VI*, we reversed the district court's judgment. See 47 F.3d at 272. In so doing, we explicitly accepted SDDS's arguments on both of these contested issues, and we explicitly rejected the Defendants' positions. Regarding the protected property interest in operating the MSWD, we stated:

> In 1991, S.D. Codified Laws § 34A-6-1.13 was amended and the implementing regulations were rewritten.Although the ultimate question of whether the facility was environmentally safe and in the public interest remained the same, several factors weighing into the agency's decision changed. On remand after *SDDS I*, the agency made the specific findings required by its revised regulations. The agency found the Lonetree facility to be environmentally safe, using language that parallels the applicable regulation.Appellant's App. at 117 (Finding # 52, paralleling S.D. Admin.R. 74:27:17:01). The agency found the facility to be in the public interest. Appellant's

---

[11] For example, SDDS previously argued that the procedural defect in the [Board's] original decision — the lack of findings that resulted in the remand in *SDDS I* — had been cured by the time of the Referendum.... [O]n remand the [Board] entered extensive findings responsive to the [South Dakota] Supreme Court's mandate and concluded that SDDS had met "all requirements" for the issuance of a solid waste permit under the relevant laws and regulations of South Dakota.

Appellant's Reply Br. in No. 94-1688, at 7, reprinted in Appellant's App. at Tab 3 (note omitted). See also *id.* at 3 ("[t]he State attempts to avoid the consequence of its admission concerning the Referendum's 'practical effect,' by engaging in an inventive but, unfortunately, distorted analysis of the state court litigation").

> App. at 121 (Finding # 72). Both findings were preceded by numerous supporting factual findings. The revised [Board] findings also contain a specific legal conclusion that all requirements for the permit had been met. Appellant's App. at 122 (Conclusions of law # 3 & # 4).

SDDS VI, 47 F.3d at 265 n.5 (emphasis added)[12]. This determination that all of the factual predicates and legal requirements for SDDS's permit had been met was necessarily dispositive of SDDS's property interest in the permit itself. See *Littlefield* v. *City of Afton*, 785 F.2d 596, 602 (8th Cir. 1986) ("We hold that appellants have a property interest in the building permit because they complied with all the legal requirements contained in the ordinances of the City of Afton.Appellants need not comply with illegal conditions in order to have a property interest in the permit." (emphasis in original)), *holding limited in part on other grounds*, *Lemke* v. *Cass County, Neb.*, 846 F.2d 469, 470-71 (8th Cir. 1987) (per curiam) (en banc) (holding that "[w]hether a substantive due process claim may arise from a denial of a zoning permit is an open question in this circuit and need not be decided in this case").[13]

---

[12] We note that these factual determinations by an administrative agency must be given "great weight" by South Dakota courts. See SDCL 1-26-36.

[13] In adopting the factual findings of the Board in *SDDS VI*, we did not then — and need not now — address the issue of whether those findings were entitled to claim preclusive effect. See *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 109-10, 111 S. Ct. 2166, 2170, 115 L.Ed.2d 96 (1991) ("Although administrative estoppel is favored as a matter of general policy, its suitability may vary according to the specific context of the rights at stake, the power of the agency, and the relative adequacy of agency procedures."). Put bluntly, here we are not concerned with determining the accuracy of our

Regarding the effect of the referendum on SDDS, we stated in *SDDS VI* that:

> Despite the fact that it has previously conceded that "[t]he practical effect of the referendum was to prohibit the construction" of the Lonetree facility, Appellant's App. at 39, South Dakota now argues that because the [Board] permit had been revoked, the referendum had no impact, discriminatory or otherwise, on Lonetree. However, if this court were to ignore South Dakota's intermediary actions and look only to the result, it would reward South Dakota for acting unconstitutionally. Moreover, the administrative permit was voided due to a procedural defect, not because of any finding that the Lonetree facility was environmentally dangerous. Thus, Lonetree could reapply for the administrative permit, and the referendum at the very least made the Lonetree project more difficult and expensive to accomplish.

Id. at 270 n.10 (citations and quotations omitted).[14]

---

decision in *SDDS VI*, but rather in insuring its effectiveness. See, *e.g.*, *Moe* v. *Moe*, 496 N.W.2d 593, 595 (S.D.1993) (res judicata applies "whether the court was correct at the time or not"). If the Defendants were dissatisfied with our adjudication of their case in *SDDS VI*, their options were to request rehearing by this Court en banc or to petition the United States Supreme Court for a writ of certiorari. They may not, however, collaterally challenge our decisions in the South Dakota state courts. See *City of Tacoma*, 357 U.S. at 334, 78 S. Ct. at 1217-18.

[14] Indeed, our ruling echoed that of the South Dakota Supreme Court in *SDDS IV*, 507 N.W.2d at 703, which found that the referendum "placed Senate Bill 169 in limbo and shut down the [Lonetree] facility pending the outcome of the general election." See also *SDDS III*, 994 F.2d at 489 ("S.B. 169 was, therefore, effectively vetoed by the citizens of South Dakota

The issues which the Defendants now wish to relitigate in the state courts were, therefore, actually and finally decided by this Court in *SDDS VI*. Under South Dakota's rules of claim preclusion or collateral estoppel, we conclude that this Court's decision in *SDDS VI* bars the Defendants from relitigating these settled issues in subsequent litigation in the state courts. See, *e.g.*, *Moe* v. *Moe*, 496 N.W.2d 593, 595 (S.D.1993):

> [I]f the prior final judgment or order had been rendered by a court of competent jurisdiction, it is conclusive as to all rights, questions, or facts directly involved and actually, or by necessary implication, determined therein, whether the court was correct at the time or not.
>
> We apply four factors to determine whether the doctrine of [claim preclusion] bars this appeal: (1) whether the issue decided in the former adjudication is identical with the present issue; (2) whether there was a final judgment on the merits; (3) whether the parties are identical; and (4) whether there was a full and fair opportunity to litigate the issues in the prior adjudication.

(citations and quotations omitted). See also *Black Hills Novelty Co.* v. *South Dakota Comm'n*, 520 N.W.2d 70, 73 (S.D.1994) (describing elements of collateral estoppel). In this case, all of these elements have unquestionably been met: the issues are the same, the parties are the same, there was a final judgment on the merits in *SDDS VI*, and the record amply reveals that the Defendants were not only given, but took every opportunity, to fully and fairly litigate these issues before us. Because the Defendants are barred by claim preclusion from relitigating the issues of (1) whether SDDS had a legitimate claim of entitlement to a permit to operate an MSWD, and (2) whether the referendum was the proximate cause of SDDS's dissolution, the relitigation exception to the Anti-Injunction Act permits

---

and the Lonetree project has been unable to proceed since.").

injunctive relief to prevent them from so relitigating these issues in the South Dakota state courts.[15]

V.

We recognize, however, that "[t]he fact that an injunction may issue under the Anti-Injunction Act does not mean that it must issue. The injunction must be an otherwise proper exercise of the [court's] equitable power." *Daewoo Elecs.* v. *Western Auto Supply Co.*, 975 F.2d 474, 478 (8th Cir. 1992). We review the district court's denial of injunctive relief for abuse of discretion.See *Goff* v. *Harper*, 60 F.3d 518, 520 (8th Cir. 1995). "Abuse of discretion occurs if the district court rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions." *Hosna* v. *Groose*, 80 F.3d 298, 303 (8th Cir.) (quotations and citations omitted), *cert. denied*, 519 U.S. 860, 117 S. Ct. 164,

---

[15] Under the Full Faith and Credit Act, 28 U.S.C. § 1738, we are bound by a state court's application of its res judicata rules to our judgments. See *Parsons Steel, Inc.* v. *First Ala. Bank*, 474 U.S. 518, 524, 106 S. Ct. 768, 772, 88 L.Ed.2d 877 (1986):

> We believe that the Anti-Injunction Act and the Full Faith and Credit Act can be construed consistently, simply by limiting the relitigation exception of the Anti-Injunction Act to those situations in which the state court has not yet ruled on the merits of the res judicata issue. Once the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision.

Because the South Dakota trial court did not rule on the claim preclusive effect of *SDDS VI*, see *SDDS VII*, Mem. Op. at 2 n.3, 5, 20-21, we are not precluded from protecting our judgment in *SDDS VI* under the relitigation exception to the Anti-Injunction Act. See *Daewoo Elecs.* v. *Western Auto Supply Co.*, 975 F.2d 474, 479 (8th Cir. 1992).

136L.Ed.2d 107(1996). See also *Walser* v. *Toyota Motor Sales, U.S.A., Inc.*, 43 F.3d 396, 401 (8th Cir. 1994) ("We will not disturb a district court's discretionary decision if that decision remains within the range of choice available to the district court, accounts for all relevant factors, does not rely on any irrelevant factors, and does not constitute a clear error of judgment." (quotations and citations omitted)).

In analyzing SDDS's motion for injunctive relief, the district court stated that:

> Essentially, SDDS's claim for injunctive relief seeks to have this Court enjoin a proceeding before the South Dakota Supreme Court. This Court declines to take such action.

SDDS, Inc. v. *State of S.D.*, Civil No. 91-5121 (D.S.D. May 28, 1996), reprinted in I Appellant's App. at Tab 12. While this description overstates the degree of relief requested by SDDS — which sought to enjoin the relitigation of specific issues, rather than a blanket injunction of all consideration of its dispute with the Defendants by the South Dakota Supreme Court — it does represent a proper concern by the district court for a core element of federalism, embodied by the Anti-Injunction Act, that the federal courts should not interfere with the state courts' operation. See, *e.g.*, *Southwest Airlines Co.* v. *Texas Int'l Airlines*, 546 F.2d 84, 91 (5th Cir. 1977) ("few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies" (analyzing abstention doctrine and Anti-Injunction Act) (quoting *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496, 500, 61 S. Ct. 643, 645, 85 L.Ed. 971 (1941))), *cert. denied*, 434 U.S. 832, 98 S. Ct. 117, 54 L.Ed.2d 93 (1977); but see *United States* v. *Rural Elec. Convenience Co-Op. Co.*, 922 F.2d 429, 439 (7th Cir. 1991) ("we do not believe that comity and federalism should be considered 'public interest' factors that militate against the issuance of an injunction").

The district court's analysis fails, however, to consider the factors which support the issuance of injunctive relief in this case. In *Dataphase Sys., Inc.* v. *C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc), this Court held that:

> Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Applying the *Dataphase* factors to the case before us, we conclude that the district court abused its discretion in denying injunctive relief. Requiring SDDS to relitigate in the state court issues previously decided by this Court constitutes an irreparable harm. See, e.g., *Daewoo*, 975 F.2d at 478 (affirming district court's finding that petitioner "would suffer irreparable harm if injunctive relief were not issued because it would face relitigation of claims already adjudicated in its favor").[16/]

Goodrich v. *Supreme Court of S.D.*, 511 F.2d 316, 317 (8th Cir. 1975) (refusing to enjoin state court disbarment proceeding (citing *Younger* v. *Harris*, 401 U.S. 37, 46, 91 S. Ct. 746, 751, 27 L.Ed.2d 669 (1971))). Where a petitioner seeks to enjoin a state court's civil proceeding, however, we have only required a showing of "irreparable harm" to allow a grant of injunctive relief. See *Daewoo*, 975 F.2d at 478 (analyzing *Goodrich*).

While issuing the injunction in this case will foreclose the opportunity for the Defendants to relitigate issues in the state court, we do not believe that this is a legitimate harm which must be balanced. As noted above, the Defendants had one full

---

[16] A petitioner seeking to enjoin a criminal or quasi-criminal state court proceeding must demonstrate a threat of "great and immediate irreparable injury that cannot be eliminated by his defense to the state proceeding."

and fair opportunity to litigate these issues in the federal forum, and the rules of equity do not require that they be given a second bite at the apple in the state forum in order to obtain a more favorable result. See, e.g., *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299, 37 S. Ct. 506, 508, 61 L.Ed. 1148 (1917) ("This doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect." (quotations and citation omitted)).

The third and fourth Dataphase elements also support issuance of an injunction in this case. As discussed above, SDDS successfully litigated in *SDDS VI* the issues currently contested by the Defendants; SDDS's success on the merits of the underlying issue is therefore already secured. In addition, the public policy concerns of finality and repose informing our res judicata jurisprudence strongly supports the protection of our previous judgment. While the interference with a state court proceeding is generally opposed by public policy, this "injunction will promote judicial economy and protection of parties from harassing, duplicative litigation, interests which the federal and state courts share." *Daewoo*, 975 F.2d at 479 (citation omitted).

We find no merit in the Defendants' remaining arguments opposing the granting of injunctive relief. We therefore reverse the district court's denial of injunctive relief in this case, and remand to the district court for an order enjoining the Defendants from relitigating in the South Dakota state courts the issues of (1) whether SDDS had a legitimate claim of entitlement to a permit to operate an MSWD, and (2) whether the referendum was the proximate cause of SDDS's dissolution.

United States Court of Appeals,
Eighth Circuit.

SDDS, INC., a South Dakota
Corporation, Appellant,

v.

STATE OF SOUTH DAKOTA; Mark W. Barnett,
Attorney General of the State of South
Dakota; Walter D. Miller, as Governor of the
State of South Dakota; Joyce Hazeltine,
Secretary of State of the State of South
Dakota, Appellees,

Action for the Environment, Intervenor Below.

No. 94-1688.

Submitted Nov. 15, 1994.
Decided Feb. 6, 1995.

Before MAGILL, Circuit Judge, JOHN R. GIBSON, Senior Circuit Judge, and BEAM, Circuit Judge.

MAGILL, Circuit Judge.

South Dakota Disposal Systems, Inc., (SDDS) appeals the district court's grant of summary judgment to the defendants, the State of South Dakota and various state officials (collectively, "South Dakota"), and its denial of SDDS's cross-motion for summary judgment. At issue in this § 1983 suit is whether the referendum of a measure permitting SDDS to operate a large-scale municipal solid waste disposal (MSWD) facility in South Dakota violates the dormant commerce clause or SDDS's rights to due process and equal protection.Because we find that the referendum was the latest in a series of protectionist roadblocks erected by South Dakota,

we hold that the referendum violates the dormant commerce clause. Accordingly, we reverse.[1]

I. BACKGROUND

This appeal is the latest in a seemingly never-ending series of cases arising from SDDS's six-year-long struggle to develop a large-scale MSWD facility near Edgemont, South Dakota. In November 1988, SDDS filed with the South Dakota Department of Water and Natural Resources (DWNR)[2] an application for a permit to site, construct and operate a MSWD facility (the Lonetree facility). At the time, South Dakota's administrative permitting procedure for SWD facilities was to issue a one-year initial permit if the facility was determined to be environmentally safe and in the public interest, then to issue five-year renewals of that permit after de novo review of the safety of the facility. See S.D.Codified Laws § 34A-6-1.16 (1986 & Supp.1989). After much judicial[3] and political[4] wrangling, the Board of Minerals and the Environment (BME),

---

1 We express no view as to the merits of the due process or equal protection claims brought by SDDS.

2 The Department has since changed its name to the Department of Environment and Natural Resources. We will use the old name throughout this opinion in the hope that it may, in some small way, simplify this appeal.

3 The DWNR failed to act upon the application within 120 days, as required by S.D.Admin.R. 74:27:04:05(2). SDDS sued, and in *SDDS, Inc.* v. *South Dakota Dep't of Water & Natural Resources*, Civ. Case No. 18-179 (S.D. 6th Cir. Ct. July 5, 1989), the DWNR was ordered to act upon the application.

4 After it was forced to act, the DWNR initially recommended that the application be approved. South Dakota Governor Mickelson intervened and caused the DWNR to reverse its position, resulting in a referral to the BME.

a branch of the DWNR, held a hearing on whether SDDS's application should be granted. The BME determined that the Lonetree facility was environmentally safe and in the public interest, as required by S.D.Codified Laws § 34A-6-1.13 (1986 & Supp. 1989), and issued the initial one-year permit on September 9, 1989. While the one-year permit was in effect, SDDS applied for a five-year renewal permit. The BME conducted additional hearings and issued the renewal permit in December 1990 based on independent findings that the Lonetree facility was safe and in the public interest.

SDDS's two permits have generated much litigation.In *In re Application of SDDS, Inc., for a Solid Waste Permit*, 472 N.W.2d 502 (S.D.1991) (*SDDS I*), the South Dakota Supreme Court held that when the BME issued the original one-year permit, it did not make sufficient factual findings from which the court could determine whether the Lonetree facility was in the public interest. The court remanded for factual findings,[5] but did not address the merits of whether the facility was in fact in the public interest. 472 N.W.2d at 512. In *In re 1990*

---

[5] In 1991, S.D.Codified Laws § 34A-6-1.13 was amended and the implementing regulations were rewritten.Although the ultimate question of whether the facility was environmentally safe and in the public interest remained the same, several factors weighing into the agency's decision changed. On remand after *SDDS I*, the agency made the specific findings required by its revised regulations. The agency found the Lonetree facility to be environmentally safe, using language that parallels the applicable regulation.Appellant's App. at 117 (Finding # 52, parallelling S.D.Admin.R. 74:27:17:01). The agency found the facility to be in the public interest. Appellant's App. at 121 (Finding # 72). Both findings were preceded by numerous supporting factual findings. The revised BME findings also contain a specific legal conclusion that all requirements for the permit had been met. Appellant's App. at 122 (Conclusions of law # 3 & # 4).

Renewal Application of SDDS, Inc., 507 N.W.2d 702 (S.D.1993) (*SDDS IV*), the South Dakota Supreme Court held that the renewal permit was void from its inception because the original one-year permit was found invalid in *SDDS I*. *SDDS IV*, 507 N.W.2d at 703-04.

Meanwhile, South Dakota voters addressed SDDS's attempt to develop the Lonetree facility by placing an initiative on the November 1990 ballot. This initiative required legislative approval of any large-scale SWD facility in addition to the administrative approval required of all SWD facilities regardless of size. Legislative approval was conditioned upon a finding that the facility was environmentally safe and in the public interest. Under South Dakota law, the Secretary of State is required to publish a pamphlet containing an Attorney General's explanation of, S.D.Codified Laws § 12-13-9 (1982 & Supp.1994), and public comment on, S.D. Codified Laws § 12-13-23 (1982 & Supp.1994), each initiated or referred measure. South Dakota stated at oral argument that this pamphlet is part of the legislative history of these initiated and referred measures. The Attorney General's explanation of the November 1990 initiative stated that it would apply retroactively to existing facilities (*i.e.*, the Lonetree facility), and that only one facility (*i.e.*, the Lonetree facility) would be affected. The initiative was passed in the November 1990 election, and is codified at S.D.Codified Laws § 34A-6-53 to 56 (1992).

Shortly after the initiative was passed, the South Dakota legislature passed, and the governor signed, 1991 S.B. 169, codified at S.D. Codified Laws § 34A- 6-57 (1992), which gave the required legislative approval to the Lonetree facility. A referendum on S.B. 169 was certified on May 8, 1991. The Attorney General prepared an explanation of S.B. 169 and published arguments pro and con.The Attorney General's explanation states that the legislature found the facility to be environmentally safe and in the public interest and that the DWNR permits were "declared invalid in a court decision."

The three- sentence "pro" statement mentions public support for the facility in the Edgemont area, the issuance of permits by the DWNR and the legislature, and the economic impact of the facility.

The "con" statement is the most significant part of the explanatory pamphlet in terms of length and impact. Because of the importance of this statement, we set it out at length:

> Referred Law # 1 is a direct public vote on the Lonetree mega-garbage dump near Edgemont. South Dakota Disposal Systems, Inc. (SDDS), Lonetree's owner, has stated 95% of the waste will come from out-of-state. The Board of Minerals and Environment and the legislature gave SDDS approval to bring in 65 railroad cars of garbage per day, seven days per week.
>
> ACTion for the Environment has referred that approval to a vote because South Dakota is not the nation's dumping grounds. A "NO" vote will prevent Lonetree from operating, and keep its imported garbage out of South Dakota.
>
> The U.S. Environmental Protection Agency has stated that all landfills eventually deteriorate, and new technologies only delay leaks further into the future (Federal Register, August 30, 1988). NIMBY (not in my backyard) exists because people do not want their soil, air and water contaminated.
>
> ....
>
> ... Lonetree is not an option for South Dakota communities. It is an out-of-state dump.
>
> To the extent we become the nation's dumping grounds, we undermine successful recycling efforts elsewhere. Vote "NO" on Lonetree.

Appellant's Add. at 38. In November 1992, the referred measure was defeated, effectively vetoing the Lonetree

facility[6]. *SDDS, Inc.* v. *South Dakota*, 994 F.2d 486, 489 (8th Cir. 1993) (*SDDS V*).

These legislative activities spawned several additional lawsuits. SDDS challenged the initiative that required dual legislative and administrative approval. In *SDDS, Inc.* v. *State*, Civ. Case No. 90-412 (S.D. 6th Cir. Ct. Oct. 31, 1991) (*SDDS III*), South Dakota state judge Steven L. Zinter upheld the initiative against several attacks virtually identical to those now mounted against the referendum. Judge Zinter's decision in *SDDS III* was not appealed.

All these events bring us to the procedural history of this case in the federal courts. This appeal is the second time we have encountered the referendum. In *SDDS V*, we reversed the district court's grant of summary judgment for South Dakota and remanded the case for further proceedings. The issue resolved in *SDDS V* was whether Judge Zinter's decision concerning the legality of the initiative (*SDDS III*) precluded litigation of the legality of the referendum (*SDDS V*) under the doctrine of collateral estoppel. We held that it did not. On remand, the district court granted summary judgment for South Dakota a second time, holding that there was no due process violation because SDDS had no affected property interest, no commerce clause violation and no equal protection violation.843 F. Supp. 546, 562 (D.S.D.1994). SDDS's cross-motion for summary judgment was denied. This appeal followed.

II. DISCUSSION

A. The General Framework: Varying Levels of Scrutiny

The Supreme Court has established a two-step approach to the dormant commerce clause. The first step requires us to

---

[6] S.B. 169 never had any effect because it would not become effective as law unless and until it passed the referendum. *SDDS, Inc.* v. *State*, 481 N.W.2d 270 (S.D.1992) (*SDDS II*).

determine whether a challenged state measure discriminates against out-of-state articles (*i.e.*, is a protectionist measure). Discrimination may take one of three forms. See *Chemical Waste Mgmt.* v. *Hunt*, 504 U.S. 334, ---- n.6, 112 S. Ct. 2009, 2015 n.6, 119 L.Ed.2d 121 (1992) (noting three types of discrimination); *Southern States Landfill* v. *Georgia DNR*, 801 F. Supp. 725, 730-31 (M.D.Ga.1992) (finding statute discriminatory on its face, in purpose and in effect); *Waste Recycling* v. *Southeast Ala. Solid Waste Disposal*, 814 F. Supp. 1566 (M.D. Ala. 1993), *affirmed*, 29 F.3d 641 (11th Cir. 1994). First, a measure may facially discriminate against out-of-state articles. See, *e.g.*, *Philadelphia* v. *New Jersey*, 437 U.S. 617, 98 S. Ct. 2531, 57 L.Ed.2d 475 (1978) (facial discrimination where state statute prohibited importation of waste "which originated or was collected outside the territorial limits of the State"); *Hughes* v. *Oklahoma*, 441 U.S. 322, 336-37, 99 S. Ct. 1727, 1736-37, 60 L.Ed.2d 250 (1979) (facial discrimination where state statute provided that no one "may ship or transport minnows for sale into this state from an outside source"); *In re Southeast Ark. Landfill, Inc.*, 981 F.2d 372, 373 (8th Cir. 1992) (facial discrimination where state statute divided state into eight districts and restricted receipt of waste originating "outside of the District in which [a landfill] is located"); *Waste Sys. Corp.* v. *County of Martin, Minn.*, 985 F.2d 1381, 1386 (8th Cir. 1993) (facial discrimination where ordinance required disposal of MSW generated within county at in-county disposal facility). No one contends that the referendum is facially discriminatory. However, facial discrimination is merely one of the ways in which a state may "artlessly disclose an avowed purpose to discriminate." *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354, 71 S. Ct. 295, 298, 95 L.Ed. 329 (1951).

The other two forms of discrimination are more subtle and require us to examine the overall effect of the challenged

measures[7]. *Waste Sys. Corp.*, 985 F.2d at 1386. A second way in which a challenged measure may discriminate is that a facially neutral measure may have a discriminatory purpose. See, *e.g.*, *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53, 97 S. Ct. 2434, 2446-47, 53 L.Ed.2d 383 (1977) (discriminatory purpose where facially neutral state statute prohibiting state grading from appearing on apple boxes discriminated against Washington apples that carry state grades). Third, a facially neutral measure may have a discriminatory effect. See, e.g., *Maine* v. *Taylor*, 477 U.S. 131, 148 n.19, 106 S. Ct. 2440, 2453 n.19, 91 L.Ed.2d 110 (1986) (discriminatory effect may be found where state "respond[s] to legitimate local concerns by discriminating arbitrarily against interstate trade"); *GSW, Inc.* v. *Long County, Ga.*, 999 F.2d 1508, 1517 (11th Cir. 1993) (discriminatory effect where county imposed 150-mile restriction on origin of waste); *Government Suppliers Consol. Serv.* v. *Bayh*, 975 F.2d 1267, 1278-79 (7th Cir. 1992) (discriminatory effect where state statute imposed "backhaul ban" and additional registration and stickering requirements), *cert. denied*, 506 U.S. 1053, 113 S. Ct. 977, 122 L.Ed.2d 131 (1993).

At the second step of the analysis, we apply the appropriate level of scrutiny. The Supreme Court has established two levels of scrutiny. The determinative factor is the presence or absence of discrimination against interstate commerce. If the state measure is discriminatory, it is subjected to the "strictest scrutiny," *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality of the State of Oregon*, 511 U.S. 93, ----, 114 S. Ct. 1345, 1351, 128 L.Ed.2d 13 (1994) (quoting *Hughes*, 441 U.S. at 337, 99 S. Ct. at 1736-37), and a "virtually per se rule of

---

[7] "[T]he evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia*, 437 U.S. at 626, 98 S. Ct. at 2536-37. Facial discrimination generally involves a discriminatory purpose and a discriminatory effect, while the other two forms of discrimination involve one or the other.

invalidity" applies. *Oregon Waste Sys.*, 511 U.S. at ----, 114 S. Ct. at 1351 (quoting *Philadelphia*, 437 U.S. at 624, 98 S. Ct. at 2535-36); *Landfill*, 981 F.2d at 375.Southeast Ark[8]. If "other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade," the measure is subjected to a more flexible balancing test. *Pike* v. *Bruce Church*, 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L.Ed.2d 174 (1970); Philadelphia, 437 U.S. at 624, 98 S. Ct. at 2535-36; *Waste Sys. Corp.*, 985 F.2d at 1385-86; *Southeast Ark. Landfill*, 981 F.2d at 375. We address each of these two steps in turn.

B. What Level of Scrutiny: Is there discrimination?

Although the referendum is not facially discriminatory, we find that the referendum was certified and that the referred measure was defeated for a discriminatory purpose. We also find that the referendum has a discriminatory effect against interstate commerce. We therefore apply the "strictest scrutiny" to the referendum.

1. Does the referendum have a discriminatory purpose?

The presence of a discriminatory purpose is one of three ways to trigger strict scrutiny. *Hunt*, 432 U.S. at 352-53, 97

---

[8] We (and numerous other courts) have previously stated that Philadelphia establishes a "*per se* rule of invalidity." *Waste Sys. Corp.*, 985 F.2d at 1387. Although this statement may be inaccurate in a technical sense (the full quotation from Philadelphia is "a virtually *per se* rule of invalidity"), it accurately states the results of cases in which strict scrutiny is applied. The only way that discriminatory state action can withstand this level of scrutiny is if the state demonstrates that the out-of-state articles are more dangerous than are in-state articles. *Chemical Waste Mgmt.*, 504 U.S. at ---- - ----, 112 S. Ct. at 2014-15 (applying principle to waste); *Taylor*, 477 U.S. at 131, 106 S. Ct. at 2440-43. Neither party to this appeal makes any such claim.

S. Ct. at 2446-47; *Chemical Waste Mgmt.*, 504 U.S. at ---- n.6, 112 S. Ct. at 2015 n.6; *Waste Sys. Corp.*, 985 F.2d at 1381. The record is replete with direct and indirect evidence of an avowed discriminatory purpose behind the referendum.

The record contains two pieces of direct evidence of a discriminatory purpose. First, in *SDDS III*, Judge Zinter noted that the initiative "was purposely drafted to insure that, except for Lonetree, the Initiated Measure would not apply to existing or foreseeable future landfills that dispose of South Dakota waste." Appellant's App. at 184. The dual administrative and legislative approval required by the initiative was specifically designed and intended to hinder the importation of out-of-state waste into South Dakota. The purpose of the first and only referendum under the initiative cannot be divorced from the purpose of the initiative itself. The initiative was drafted to defeat a specific "out-of-state dump" by requiring an additional approval, and the referendum concerns that very approval for the same "out-of- state dump." We believe that the discriminatory purpose behind the initiative infected the referendum as well. Second, the legislative history of the referred measure is brimming with protectionist rhetoric. The state-sponsored pamphlet that accompanied the referendum contained a "con" statement that exhorted voters to vote against the "out-of-state dump" because "South Dakota is not the nation's dumping grounds," and "[a] 'NO' vote will prevent Lonetree from operating, and keep its imported garbage out of South Dakota." This is ample evidence of a discriminatory purpose to trigger strict scrutiny.

In addition to this direct evidence of a discriminatory purpose, there is substantial indirect evidence that the referendum was motivated by a discriminatory purpose. In Hunt, the Supreme Court found "it somewhat suspect" that the means used to achieve the state's "ostensible ... purpose" were relatively ineffective. *Hunt*, 432 U.S. at 352, 97 S. Ct. at 2446. Likewise, South Dakota has employed a highly ineffective means to pursue its ostensible purpose of environmental

protection.After the initiative passed, a large-scale MSWD facility in South Dakota was required to obtain two things: an administrative permit and legislative authorization.South Dakota argues that large MSWD facilities generally pose a greater risk to the environment than do smaller facilities. We will assume for the sake of our decision that this is true. However, although the general difference in risk between larger and smaller facilities justifies a general requirement of legislative approval for large MSWD facilities, a general difference in risk, without more, is insufficient to support a particular denial of legislative approval. South Dakota must demonstrate not only that there are legitimate interests justifying the general requirement of dual approval, but it must also show that this particular review furthered those goals. Although *SDDS III* establishes that requiring both administrative and legislative approval for large facilities is permissible because the difference in risk between large and small facilities is a legitimate state interest, South Dakota has completely failed to demonstrate that the referendum that denied legislative approval for the Lonetree facility in any way furthered the state's legitimate concerns with safety and environmental protection.

South Dakota's most significant environmental protection device is the administrative permitting process for SWD facilities. Anyone who sites, develops or operates a SWD facility in South Dakota must obtain a permit from the DWNR. S.D.Codified Laws § 34A-6-1.4 (1992). SDDS sought a permit for the Lonetree facility from the DWNR, and when the permit was contested, the BME held hearings to determine whether the Lonetree facility was environmentally safe and in the public interest. The permit was granted, appealed, remanded, reissued, reappealed, renewed, and ultimately voided. The fact that SDDS's permit for the Lonetree facility was so carefully scrutinized indicates that the administrative permitting process is a relatively effective means of environmental protection.In fact, South Dakota admits that the Lonetree facility is safe and

in the public interest if operated in accordance with the DWNR permit conditions. Appellant's App. at 165. Thus, the benefit of the added requirement of legislative approval is not that the legislature provides the sole means by which South Dakota protects its environment from potentially unsafe SWD facilities. Rather, the legislative approval provides a second opportunity to review the proposed facility. Thus, the dual process provides an incremental benefit over the administrative process alone to the extent that the legislature is able to detect unsafe facilities that are not detected by the DWNR.

Because the benefit of legislative review is that it screens out unsafe large facilities that survived the administrative review process, the benefit of each legislative review is directly proportional to the amount of scrutiny of the environmental effects of the proposed facility that occurs in that review[9]. The challenged referendum cannot be said to have provided any benefits because the body that disapproved the Lonetree facility (*i.e.*, the South Dakota electorate) was provided with: (1) no standards or information to use to evaluate the benefits and risks of the Lonetree facility; and (2) information that leads to an unreliable result. South Dakota has admitted that there were

---

[9] Viewing the benefit in this manner distinguishes the dual permitting measure from the absolute bans on large landfills that have been approved in dicta. See, *e.g.*, *Southeast Ark. Landfill*, 981 F.2d at 376; *Fort Gratiot Landfill* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353, ----, 112 S. Ct. 2019, 2027, 119 L.Ed.2d 139 (1992). An absolute ban is analogous to a permissible quarantine law. There is a legitimate state interest in environmental protection, and the absolute ban is the best, or at least a permissible, way to achieve this goal. South Dakota's legislative review process, by contrast, although supported by the same state interest in the abstract, simply does nothing to further this purported goal. Thus, the fact that legislative review is less restrictive than an absolute ban, rather than being an asset, proves fatal.

no standards to guide the electorate. Appellant's App. at 166. Indeed, in *SDDS III*, Judge Zinter noted that the referral was a "standardless review by the electorate." Appellant's App. at 207 n.9. The voters simply voted yes or no without any criteria and with severely limited information to guide them in evaluating the effects of the Lonetree facility. Thus, because the voters were not provided with any meaningful criteria, the defeat of the referred measure cannot be seen as improving environmental protection.

Additionally, voters were bombarded with protectionist propaganda that renders the result of the referendum unreliable as an environmental review. The legislative history of the referred measure consists largely of the state-sponsored explanatory pamphlet that contains an official explanation and arguments pro and con.Since the referred measure was defeated, the "con" statement is the most important. See *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 680, 101 S. Ct. 1309, 1321, 67 L.Ed.2d 580 (1981) (Justices Brennan and Marshall, concurring in judgment) (noting that dispositive issue is lawmakers' assessment of benefits and burdens). The con statement mentions general findings by the EPA that all landfills eventually degenerate, and also mentions recycling and the potential for hazardous waste dumping. However, no connection is made between these vague and general statements and the Lonetree facility.

Moreover, the few specific environmental concerns that are mentioned in the middle four paragraphs are sandwiched between five paragraphs containing pleas to reject "imported garbage" and the "out-of-state dump." This protectionist concern clearly emerges as the dominant reason to reject the referred measure. The opposition begins and ends its presentation with a plea to keep South Dakota from becoming the nation's dumping grounds. Such propaganda does nothing to enhance any meaningful review of the environmental impact; it merely allows protectionism to run rampant.

South Dakota purports to seek a second review of large-scale SWD facilities that pose increased environmental risks in order to protect its natural resources, but this particular review consisted of a referendum steeped in inflammatory propaganda and does virtually nothing to further this purported goal. This indirect evidence strengthens the conclusion that the denial of approval had a discriminatory purpose, and confirms our decision that the referendum must receive strict scrutiny.

2. Does the referendum have a discriminatory effect?

Alternatively, even if South Dakota had not openly declared a discriminatory purpose, the referendum is discriminatory in its effect, and this type of discrimination will also trigger strict scrutiny[10]. *Hughes*, 441 U.S. at 336, 99 S. Ct. at 1736; *Hunt*, 432 U.S. at 352-53, 97 S. Ct. at 2446- 47. *Hunt* applied strict scrutiny to a facially neutral statute in a situation that is analogous to the referral of S.B. 169. In *Hunt*, North

---

[10] Despite the fact that it has previously conceded that "[t]he practical effect of the referendum was to prohibit the construction" of the Lonetree facility, Appellant's App. at 39, South Dakota now argues that because the BME permit had been revoked, the referendum had no impact, discriminatory or otherwise, on Lonetree. However, "[i]f this court were to ignore [South Dakota's] intermediary actions and look only to the result, it would reward [South Dakota] for acting unconstitutionally." *GSW, Inc.*, 999 F.2d at 1518. Moreover, the administrative permit was voided due to a procedural defect, not because of any finding that the Lonetree facility was environmentally dangerous. Thus, Lonetree could reapply for the administrative permit, and the referendum at the very least made the Lonetree project more difficult and expensive to accomplish. The absence of a reapplication to the BME is not fatal. See *Diamond Waste, Inc.* v. *Monroe County, Ga.*, 939 F.2d 941, 943 (11th Cir. 1991) (applying Pike test to invalidate county's disallowance of landfill, despite absence of application required by statute).

Carolina banned the placement of any grading (other than USDA grading) on closed shipping containers of apples. This measure affected only Washington state apples (which bore Washington state grades). Thus, in *Hunt*, out-of- staters were singled out to bear 100% of the cost of the measure. The structure of the "garbage market" in South Dakota is such that the referendum has a discriminatory effect. South Dakota generates 600,000 to 700,000 tons of MSW each year. In addition to this in-state waste, three facilities accept out-of-state waste (they accepted 60,000 tons in 1992). As a result of the low rate of domestic waste generation and the costs of regulation, the existing disposal facilities in South Dakota are fairly small; the largest facility disposes of 125,000 tons per year. New facilities must be large scale in order to recover the costs imposed by environmental regulations. The Lonetree facility was designed to accept 1.5 million tons of MSW per year. According to the literature accompanying the referendum, 95%[11] of this waste would originate outside South Dakota.

Hunt is analogous to this appeal because both involve a facially neutral measure that exports costs to out-of-staters[12].

---

[11] *SDDS III* found that 90% of the waste would originate outside South Dakota. Slip op. at 3. SDDS makes similar claims.

[12] The fact that only 90% rather than 100% of the costs of excluding the waste fall on out-of-staters does not eliminate the discriminatory effect. This fact merely reduces the scope of the discrimination.*Fort Gratiot*, 504 U.S. at ----, 112 S. Ct. at 2025; *Waste Sys. Corp.*, 985 F.2d at 1387 n.11. The extent of the discrimination is not relevant to the prior determination whether the state has discriminated against interstate commerce. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 455-56, 112 S. Ct. 789, 801, 117 L.Ed.2d 1 (1992). In a similar vein, the fact that South Dakota later chose to permit importation of waste by

Hunt was a case where North Carolina sought to eliminate Washington's competitive advantages, so that North Carolina farmers could usurp part of the North Carolina apple market that belonged to Washington growers. Here South Dakota is attempting to exclude out-of-state trash that has a "negative" value, thus forcing other states to bear the cost of disposing of the trash when the market would otherwise dispose of the trash in South Dakota. Any distinction between these two species of protectionism is of no consequence. *Waste Sys. Corp.*, 985 F.2d at 1386. Indeed, Judge Zinter noted an analogy between the initiative and Hunt in *SDDS III*. Appellant's App. at 182. Moreover, we note that in *SDDS III*, Judge Zinter specifically found that the initiative had a discriminatory effect. Slip op. at 14-15. Just as the purpose of the initiative and the referendum are intimately connected, so are the effects. Thus, because the garbage market of South Dakota is such that the referendum so predominantly affects only out-of-staters, we believe that the referendum of S.B. 169 is discriminatory in effect, and must receive strict scrutiny.

C. Application of Strict Scrutiny

Once strict scrutiny is triggered, "the burden falls on the State to justify [the measure] both in terms of the local benefits flowing from the statute and the unavailability of a nondiscriminatory alternative adequate to preserve the local interests at stake." *Hunt*, 432 U.S. at 353, 97 S. Ct. at 2446-47; *Chemical Waste Mgmt.*, 504 U.S. at ----, 112 S. Ct. at 2014. We find that the referendum fails both prongs of this test because the record demonstrates that (1) the denial of

---

the Big Stone plant goes only to the extent of the discrimination, not its existence. Moreover, because the issue is the referendum that was specific to Lonetree, it is questionable whether Big Stone has any relevance at all. To determine whether there was any discrimination, we must look to the effects on the garbage market as it existed at the time of the referendum.

legislative approval by the referendum does not further the legitimate goal of environmental safety, and therefore provides no local benefits; and (2) a nondiscriminatory alternative is available because legislative review of the Lonetree facility may be obtained without a referendum in which the predominant argument is the imported nature of the garbage at Lonetree.

In order to survive strict scrutiny under the commerce clause, South Dakota first must demonstrate that the referendum on the Lonetree facility provided some local benefits. South Dakota identifies environmental protection as the sought-after benefit. Although the goal of environmental protection is a permissible one, as we have already discussed, the referendum on S.B. 169 simply does nothing to advance this goal. Because there is already one procedure in place to protect the environment, and this second review provides only an incremental amount of additional protection, this referendum in which voters were distracted by distinctly non-environmental concerns provided no local benefit. South Dakota has not carried its burden to prove that this referendum resulted in increased environmental protection.

To survive strict scrutiny, South Dakota must also demonstrate the lack of a nondiscriminatory alternative to this referendum under the dual permitting scheme. Things such as a new administrative agency or more stringent regulations are possible alternatives, but these were rejected as alternatives to the initiative by the South Dakota state court in *SDDS III*. However, *SDDS III* addressed only the initiative. *SDDS V*, 994 F.2d at 493-94. We must look at alternative ways in which this particular decision regarding legislative approval might have been made. When the focus is changed from the broad focus of *SDDS III* to a narrower focus on this particular decision, nondiscriminatory alternatives emerge. The most obvious alternative is a legislative discussion in which interstate trade issues are not the dominant issues discussed. This alternative may be easily achieved through a fuller discussion of the

environmental issues, so that the record reflects that voters or legislators might reasonably have considered the environmental issues. Such an alternative, which merely modifies the contents of the legislative discussion or the voter pamphlet accompanying a referred measure, would not be any more costly than the current procedure. The alternative would more fully achieve the desired effect of protecting the environment by forcing consideration of the environmental issues without the distortions of reasoning that result from the emphasis on protectionist propaganda.

Thus, because we hold that the referendum provided no local benefit, and that a nondiscriminatory alternative was available, we conclude that the referendum fails the required strict scrutiny. We therefore hold that South Dakota's referendum of S.B. 169 violates the dormant aspects of the commerce clause of the United States Constitution.

III. CONCLUSION

We hold that South Dakota's referral of S.B. 169 violated the dormant commerce clause. Although facially neutral, the referendum had a discriminatory purpose and a sufficiently discriminatory effect to trigger strict scrutiny. Because we find that the referendum does not appreciably advance any legitimate local interest, and that nondiscriminatory alternatives are available to advance South Dakota's legitimate concerns, the referendum does not survive strict scrutiny. Accordingly, the judgment of the district court is reversed and we remand to the district court with instructions to enter judgment in favor of SDDS.

United States Court of Appeals,
Eighth Circuit.

SDDS, Inc., Appellee/Cross-appellant,

v.

State of South Dakota, Appellant/Cross-appellee.

Nos. 98-3588, 99-1034, 99-1035.

Order Denying Petition for
Rehearing and for Rehearing En Banc

November 9, 2000

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Chief Judge Wollman took no part in the consideration or decision of this matter.